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ABSTRACT

This report examines the rationale for opening deliberative processes to the public and discusses, specifically, the Michigan open-meetings law. The following topics are addressed: the definition of public business; the components of a free press; the relationship between open meetings, community expertise, and civic consciousness; and protection against wrongdoing, fraud, and misrepresentation. In addition, the conflict between the right to know and the right to privacy, secrecy and the public welfare, and governmental secrecy in general are discussed. Analysis of the Michigan law of 1976 includes treatment of the historical underpinnings of the law, as well as discussion of relevant case law and media response. It is concluded that the actual application of the Michigan open-meetings law can bring about greater access to public deliberations. In the face of ever-changing case law, however, it is evident that the open-meetings law is not without exception. (KS)

SCHOOL OF JOURNALISM, UNIVERSITY OF MISSOURI AT COLUMBIA
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FREEDOM OF INFORMATION CENTER REPORT NO. 370

"SUNSHINE" IN MICHIGAN

This report was taken from a thesis by Carl L. Parks written as part of the requirements for the Master of Arts degree from the School of Journalism, Michigan State University.

I. THE OPEN MEETINGS PRINCIPLE

> . . . government by private understanding deprives you of representation, deprives the people of representative institutions. It has got to be put into the heads of legislators that public business is public business. —Woodrow Wilson[1]

The Public's Business

Open-meetings legislation derives from the tenet that public business, not private business, is what concerns a legislative body. In any government that purports to be democratic, citizens deserve access to more than *pro forma* sessions of formal "ayes" and "nays." They have an inherent right to witness the clash of opinion that results in restraints, taxes, and other public matters. They have a "right to know." (The phrase "right to know" was coined in 1945 by former Associated Press Executive Director Kent Cooper.)[2]

The right to know is best facilitated in an "open government." Theoretically, the subjects of an open government could not be barred from any official function of their government. At legislative, judicial, and executive levels, they would have complete access to official records and proceedings. A completely "open" government, however, is neither practicable nor desirable.

"Open meetings," on the other hand, refers to public access to legislative proceedings. Thus, open meetings law does not apply to jury deliberations or staff meetings at the executive level of government. It would, however, apply to legislative assemblies and other public boards that deliberate on behalf of the public as an adjunct of their government.

"Open meetings" legislation—also known as "sunshine" legislation because of Florida's government-in-the-sunshine law—presumes that every citizen in a democracy has the right to know how he will be affected by the decisions of his elected officials. More importantly, it supposes the citizen has the right to know exactly what these decisions are, how they were reached, and how his representatives are voting.

Power and Knowledge

The democratic governments of the United States and the State of Michigan are rooted in the tenet that governmental power not only derives from the people, but that the government *is* the people. For a government to remain the people, as opposed to an elite, the people must be an informed electorate. James Madison observed:

> Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both.[3]

Similarly, Harold Cross, a former New York *Herald Tribune* attorney, stated that:

> Public business is the public's business. The people have the right to know. Freedom of information is their just heritage. Without that, the citizens of a democracy have but changed their kings.[4]

In American society, frequent elections guarantee change through peaceful evolution rather than the destruction and anarchy that might occur without them. Given the public's right to know, leaders must remain responsive to criticism or face defeat at election time. Obviously, valid criticism can occur only when the public is informed.

Thomas Jefferson considered the elections process the "formidable censor of public functionaries," which "by arraigning them at the tribunal of public opinion produces reform peaceably which must otherwise be done by revolution."[5]

In societies without provisions for the frequent change of leaders, the right to know may produce change through violent revolution. Thus, laws which curtail the flow of information are necessary to save the state. In the words of Alberto Gainza Paz,

> The first act of any dictatorship is to suppress freedom of information. If they can't make a frontal

Summary:

This report examines the rationale for opening deliberative processes and then explores the patchwork of Michigan open meetings law, with particular attention to a bill signed into law during the 1976 legislative session.

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> attack against the press, they try by insidious ways to capture and restrict that freedom of information . . . The only way to oppose these evil forces is to defend freedom of information. . . . The defense should not be confined to newspapermen only . . . the public, the people must realize that it is a matter of vital importance for them.[6]

Of course democratic ideals take a back seat to the preservation of the state whenever it is threatened, hence wartime secrecy measures.

In a democracy, legislators and other policy makers are merely individual citizens who act for the people as a whole. Their power resides with the people, who yield power in part and only for specified intervals of time. Several open meetings laws contain statements of intent that affirm this basic tenet. Perhaps the best statement of intent is found in the Brown Act, California's open meetings law:

> In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and other public agencies in this state exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.
>
> The people of this state do not yield their sovereignty to agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.[7]

Since legislative power remains with the people as a whole, and they reserve the right to terminate or renew the delegation of that power, they must be able to go behind the decisions reached in the legislative process. They must be apprised of the pros and cons involved if they are to make sound judgments on questions of policy and select their representatives intelligently. Without access to meetings in which decisions are made, voters have no means of knowing how wisely or foolishly public business has been conducted.

The Free Press and the Right to Know

The right to know is really a composite of five fundamental rights which embody the freedoms of the press: (1) the right to gather information; (2) the right to print without prior restraint; (3) the right to print without fear of reprisal not under due process; (4) the right of access to facilities and material essential to communication; and (5) the right to distribute information without interference by government acting under law or by citizens acting in defiance of the law.[8] Journalists man the front lines in the battle for freedom of information since they, perhaps more than anybody else, seek information first hand.

It must be stressed that the press enjoys no special privilege not shared by the public at large. Even if one chooses not to publish a newspaper or newsletter, he benefits from the freedoms of the press as a receiver in the communication process.

The right to gather information is the most important element of the right to know. What good, for example, does it do to be able to print, to have access to facilities and materials, or to distribute, if one does not have access to information? The freedom of every citizen to get information is merely facilitated by the remaining four rights. Despite its importance, however, the right to gather information is probably the least well-defined. At best, it is only implied in the U.S. Constitution and it has never been dealt with directly by the U.S. Supreme Court.

The right to receive information means that every citizen should have access to governmental records and proceedings. Theoretically, every individual or special interest representative has the same right to examine documents and attend official proceedings as the reporter has. It could be said that the reporter covers proceedings for the citizen in absentia, because the latter is either unwilling or unable to do so in person.

Thomas Jefferson summed up the role of a free press in a letter to Judge Tyler in 1804: "Man may be governed by reason and truth. Our first object should therefore be to leave open to him all the avenues to truth. The most effectual hitherto found is the freedom of the press."[9]

While the press may be the most effective means through which information is disseminated, it still has shortcomings which open meetings help to overcome.

First, the press cannot be everywhere. There is simply not enough manpower available to cover every meeting of every committee. Opening meetings to the general public ensures that information is passed on, even though only a few interested persons may attend.

Second, the information obtained from attendance by the general public and from firsthand observation by the media is far more complete than minutes or other official reports. This point cannot be overemphasized, because today's press depends on public relations press releases for much of its information.

Third, open meetings ensure more accurate reporting by the press, which might otherwise have only incomplete reports slanted according to the views of the informant.

Open Meetings and Community Expertise

Nobody wants a government run completely by amateurs. Complex problems of a growing, urban society often demand professional solutions. In seeking solutions, most boards adopt one or more of the following methods. They may (1) ask the city's administrative staff to look into the problem and recommend solutions; (2) hire an outside consultant to study and report; (3) appoint an ad hoc "panel of experts"; or (4) encourage citizen participation at the grass-roots level.

Too frequently, citizen participation and democratic town meetings are seen as old-fashioned. Although everybody likes to pay lip service to democratic ideals, some observers say general participation is ill-equipped to deal with the complex problems of today's society:

> With growing populations, such meetings became unwieldly and with the growing complexity of government functions, many matters seemed to call for expert solution rather than general participation. With the emphasis on "expert solution" more and more meetings began to be held in closed or executive session.[10]

There are two fallacies in this reasoning. First, the

assumptions ignore the fact that today's citizenry is better educated than ever. By opening planning sessions, public officials enlist the expertise of the whole community. If anyone makes an error in fact or premise, it can be corrected before plans reach an advanced state. Public officials are provided with more accurate information when they elicit participation from individuals, especially on the local level where citizens have the greatest knowledge.

The second difficulty with "expert solution" is that ill-conceived plans are difficult to correct once they have reached an advanced stage. Minds that are made up are harder to change than would have been the case if shortcomings had been pointed out early in the deliberation process. When a plan has been unveiled at its final (public) hearing, the hearing becomes something of a public announcement. It is extremely unlikely that planners will be sent back to the drawing board after officials have detailed the virtues of their plan.

Open Meetings and Civic Consciousness

After years of believing "you can't fight city hall," people have begun to organize collectively to improve their quality of life. They are demanding greater participation in their governments.

Neighborhoods are probably the most grass-roots level of any such organizational effort. In the neighborhood organizations, one often hears it said that government should do things *for* its neighborhoods, not *to* them. Residents of a neighborhood are perhaps the real experts on its problems. Neighborhood organizations have become concerned with a wide range of problems: historic preservation, street lighting, parking, adequate sewerage, flood control, police protection, zoning, snow removal, etc.

In large measure, neighborhood organizations have sprung up because people were dissatisfied with their input into existing governmental structures. When government opens its deliberations to citizens, it can become more responsive to the governed because public reaction is ascertained. Citizens should have the same access to the legislative process that lobbyists have enjoyed for years.

Furthermore, when citizens are invited to share in the deliberations of their legislators and thereby begin to understand the demands of government and particular issues, they are better prepared to accept "the public good." Thus, open meetings increase compliance with a board's final actions and give them legitimacy.

Protection Against Wrongdoing

When meetings are opened to the public, the community is further protected against conflicts of interest and other malfeasance of office. It is more difficult for an individual lawmaker to mislead the majority. It is more difficult for the entire body to engage in misconduct.

Some argue that it does little good to elect honest men to office because "power corrupts and absolute power corrupts absolutely." The public has increasingly opposed irresponsible government. The mass media have directed public attention to inadequacies and abuses of government. Watergate and other scandals have shaken popular faith in the governmental process. Former Florida Attorney General Baya Harrison III says, "[I]n these times, either we're to have a situation of government under glass or government under suspicion."[11] Some have compared open meetings laws to the locks on doors which keep honest people honest.

Furthermore, honest lawmakers are protected by strong open meetings laws. It is extremely difficult to accuse a legislator of being "bought" if there are no backroom dealings.

Protection Against Fraud and Misrepresentation

Opening our legislative proceedings is somewhat akin to opening judicial proceedings. It is more difficult for a witness to perjure himself if the public is there to contradict falsehoods. This knowledge alone is often enough to check a witness who might otherwise misrepresent facts. Thus, the evidence available to lawmakers is more reliable.

The Right to Know v. the Right to Privacy

There may be a fine line between the public's business and an individual's privacy. Public servants live a dual role.

On the one hand, the public has a legitimate interest in matters involving public servants, since they affect the orderly conduct of government. But the public official does not give up all rights to privacy as an individual, when he becomes involved with the public's business. One therefore must ask what *is* the public's business and at what point does an individual's right to privacy override the public's right to know.

Opinion is divided on whether sessions involving personnel matters should be closed. Some say that potential applicants are discouraged from applying for a job if they believe word is likely to get back to their employers. Others argue that applicants seek a new job of their own volition, that the public should know of any possible conflict of interest, and that news leaks are always possible anyway.

When firing or disciplining an employee, those favoring closed sessions say that frank discussion can occur only in closed sessions, and that closed sessions are necessary to protect an individual's reputation.

Others say that, by the time a grievance reaches a policymaking body, administrative channels have already been exhausted. They cite open sessions as a means to more complete and factual information, much as judicial proceedings depend on open doors. They say that open sessions actually protect an individual's reputation against innuendo, rumor and false charges.

Perhaps the conflict between rights of the individual to privacy and rights of the public to information rests on some kind of balance.

Few would question that matters involving the moral character of a high public official merit public scrutiny, but where does one draw the line? Should policemen and firemen be subject to the same scrutiny as a mayor or city manager? Should a citizen serving on a board without compensation be subject to the same public scrutiny as an elected councilman serving with pay?

Secrecy and the Public Welfare

Into the "public welfare" category fall such exceptions to open meetings as the purchase or lease of real property, strategy and negotiation sessions associated with collective bargaining, and a board's consultation with its attorney.

Some argue that these exceptions to open meetings are necessary to protect society against threats from without and from within. In real estate matters, for example, they say that premature publicity drives up prices of properties under consideration. To some degree this argument has merit. But those who favor opening real estate deliberations say that speculators and realtors already know of property under consideration and that gag orders merely keep the general public from knowing. Further, they argue that condemnation proceedings can bring price in line with fair market value.

It is interesting to note that closed collective bargaining sessions are the only exception to Florida's attempt at total "sunshine." Here, constitutional considerations were determined to outweigh the statutory open meetings considerations.[12] Obviously, collective bargaining is a game and can not work to public advantage if negotiators operate under rules that require only one side to lay its cards on the table. Many of the same considerations apply to attorney-client relationships. In both cases, the public could be taken advantage of financially.

Official investigations may sometimes be conducted in closed sessions to protect informants. It is unlikely that closing such sessions always effects this end, however.

Group Concensus

Often a body of public officials becomes factionalized to the extent that nearly every time a controversial issue occurs, half the members can be expected to vote as one bloc and the other half can be expected to vote as the other bloc. Some view this situation as detrimental to the conduct of the public's business.

At other times, a public body may become so enamored of its own sense of unity that it becomes something of a fraternal organization, acting in its own interest at the expense of the greater society which it should be representing. The result may be decisions reached in private, followed by public sessions that are only formal voting sessions; i.e., a re-run of the earlier meeting minus the clash of opinion.

The Rise of Governmental Secrecy

Some authorities associate secrecy, and thus the need for access legislation, with the rise of big government:

> Only with the development of "big government" in the 1930s and the expanding reach of internal and external security considerations during the post-war period have these tendencies become serious and acute.[13]

Another observer who links expansion of government with concern for public access said:

> The growth of government, both in power and in service, has been a major reason for this concern with "the people's right to know" what their government is doing. It would seem significant that this high proportion of access legislation has been passed since the advent of "big government."[14]

A former editor of the Eugene, Oregon *Register-Guard*, commenting on the change in his own state, said:

> I can remember when all the functions of the State of Oregon were carried on in two relatively small buildings and with a budget of a few million a year. Now they spread through a dozen huge buildings in Salem and Portland with branch offices in every major city, and we budget in hundreds of millions.[15]

Some say that in smaller communities there is generally less concern with the need for access legislation. One small town editor in California wrote:

> I was born here, grew up with most of the people involved and we enjoy a free and easy exchange of information. I doubt whether our city officials even know of the Brown Act. No problem has come up.[16]

Similarly, in 1957 Massachusetts legislators from cities supported (*Christian Science Monitor*, 2-7-57) open meetings legislation, while those from small towns opposed it.

A large-scale operation is not a prerequisite for secrecy, however. School boards, for example, have a notorious reputation for clandestine operations. Elmer White, recently retired executive secretary of the Michigan Press Association, commented (Lansing *State Journal*, 4-25-76): "The biggest violators are school boards. They're under the impression they're being efficient with their time."

In Jackson, Michigan, local school board officials met (Jackson *Citizen Patriot*, 3-10-76) in a member's home to discuss the closing of an elementary school. And in Des Moines, Iowa, female reporters were prevented (Des Moines *Register*, 5-4-73) from covering a school board meeting when male board members adjourned to the men's room to finish their discussion.

College and university boards of trustees also have objected to efforts by the legislature to open their proceedings. Fred L. Mathews, chairman of the Southwestern Michigan College board of trustees protested:

> . . . (C)ommunity college boards of trustees were created by the Constitution of the State of Michigan and not by the legislature. The legislature has no more right to dictate when we meet, how we meet, and what we discuss than do we to pass rules governing how the legislature performs. The above is true unless we accept the premise that "might makes right."[17]

He went on to discount closed meetings as a source of public distrust:

> Lack of confidence in government today is not because of local government holding "work sessions." The citizens' lack of confidence is in state and national government because it has gone too far in trodding on the individual rights of the people, including those of locally elected officials. Interference with our right of Freedom of Assembly, when official action is not being taken, is unconstitutional.[18]

Conclusions

Despite a lack of constitutional guarantees, open meetings principles are often considered as sacred to the American way of life as defined in the Bill of Rights.

Sometimes, however, the right of the public to attend the deliberations of its elected representatives may be tempered because of other, conflicting rights. Arguments to limit the degree of openness taken by a legislative body center around individual reputation and privacy, the effect of premature disclosure on the greater good of society, and possible interference with the right to assemble.

The right to attend legislative proceedings is important because knowledge is power and an informed electorate is vital to our democratic, representative form of government. The press serves as a vital link in the dissemination of knowledge.

Opening deliberative proceedings increases citizen participation and makes participants more inclined to accept "the public good." Thus, open meetings help legitimize a board's actions.

Furthermore, by opening the deliberative process to the public, legislative bodies are provided with more complete and factual information. There is less chance they will be deceived; it is more difficult for a member of the body to engage in criminal behavior; the body as a whole is discouraged from illegal activity. Charges by the public regarding such behavior are also unlikely if the body has conducted its business openly and above board.

Open meetings legislation arose in response to governmental secrecy. Some have attributed the rise in secrecy to the advent of big government during New Deal legislation in the 1930s. Some see the degree of secrecy as directly proportional to governmental size; i.e., the bigger the government, the more secretive. Others say the exact opposite is true, pointing to the amount of secrecy by school boards.

II. THE MICHIGAN OPEN MEETINGS LAW

Inadequacies Revealed

> The (new) legislation is not ideal but it's a whole lot better than what we have on the law now. Present law requires only final actions of public bodies to be taken in public. Deliberations are taken very frequently in private meetings. Many boards meet the night before. We've had examples in our nearby communities of school boards meeting in the homes of other members in closed sessions—all kinds of strange things happening.
>
> —Rep. David C. Hollister (D-Lansing)[19]

On March 9, 1976, members of the Jackson, Michigan School Board met secretly in the home of their vice president to discuss closing two elementary schools. Two days earlier, the home had been the site of another such "administrative briefing" on Jackson's transition from a junior high to a middle school system. A Michigan State University professor offered expert opinion.

There is (Jackson *Citizen Patriot*, 3-10-76) little question that both issues vitally concerned parents of school children, despite claims of a trustee that "[t]here was no new information presented that hadn't been discussed at the public meetings we've had on the subject." Even if no new data had been presented, a decision had started to crystallize.

According to one woman who had been to the meetings, lists of advantages and disadvantages for both issues had been prepared by the administration. Furthermore, the board's public information coordinator stated that tentative recommendations were presented by subcommittees on the middle school program.

When asked why the meeting had been held in a private home, the coordinator said (Jackson *Citizen Patriot*, 3-10-76), "I don't know. I didn't make the arrangements."

The following month, Michigan Attorney General Frank J. Kelley handed down a ruling in response to a question posed by Sen. Daniel S. Cooper (D-Oak Park) regarding school boards: "In answer to your question, it is my opinion that the public has a right to be present during discussion leading up to the final vote."[20]

Following that opinion, the Lansing *State Journal* published (4-29-76) an editorial that said in part:

> Lansing Board of Education's decision to hold an open meeting today to review a new court plan for desegregation of city elementary schools was a good one—and overdue.
>
> The board has been spending too much time behind closed doors during recent months, especially on this subject. Today's session was to have been closed but that decision was apparently reversed after complaints from the news media and other sources.
>
> . . . The board debated the issue for months, again doing what should have been public business mostly in executive sessions, and then delivered four plans—all of such a nature that it was predictable that Judge Fox would find them unacceptable. He did.
>
> . . . The board should get that job done with all the local expertise it can gather—and do it in the open so all citizens can understand what is going on and have an opportunity to respond to it.

The actions of these school boards represent a clear violation of the open meetings principle, if not the law. They reveal inadequacies of the old open meetings law in Michigan.

First, the closed sessions are repugnant to our system of representative democracy. The public, as the electorate, needs to be apprised of the pros and cons behind decisions of elected officials, if it in turn is to make informed decisions on election day. Obviously, they cannot go beyond and behind decisions that are made in closed, secret, or "executive" sessions.

Second, the board decisions did not make use of local talent available within the community, as the *State Journal* editorial pointed out.

Third, a board that acts in secret will want to legitimize its decision. In the case of the Jackson board, it will be harder to sell parents "the public good," if that is in fact what the final product is. In the second example, the Lansing School Board found its proposals rejected—not only by the public, but by a federal district judge.

Sources of Michigan Open Meetings Law

Michigan has what can best be described as a "patchwork of access legislation."[21] To define the status of its open meetings provisions, one must consult English common law, the U.S. and Michigan constitutions, statutory law, applicable case law, and opinions by the state attorney general.

English Common Law

It is clear that the public has no common law right to attend the meetings of its governmental bodies. In this respect, the development of open meetings legislation has been diametrically different in both point of time and nature from that of access to judicial proceedings and inspection of public records.

Harold L. Cross's 1950 study concluded that in matters of access to state and municipal legislative and administrative proceedings, the law as declared is almost wholly constitutional. After extensive research Cross wrote, "I find no judicial decision which grants or denies the right of attendance in the absence of a constitutional provision."[22] Furthermore, English parliamentary history shows a complete disregard for the "right" of reporters or anybody else to attend deliberative functions.

The secret meeting probably had its origin in efforts of the British House of Commons to protect itself against retaliation by the monarch for words uttered on the floor.

As late as 1874, "strangers" (including reporters) could be excluded upon the request of a single member of the House. Since 1875, however, their exclusion is left to the vote of all members.

In addition to exclusion from parliamentary sessions, the press in England has faced a number of repressive measures, including licensing, taxing, and direct censorship. Framers of the U.S. Constitution were primarily concerned with these means of repression when they wrote the press guarantees of the First Amendment.

Defining Open Meeting Rights Under the U.S. Constitution

At best, the right of persons to attend legislative proceedings is only implied in the U.S. Constitution. The right in part derives from press freedoms of the First Amendment. One legal scholar argues: "It is obvious that the freedom of the press implies the right to gather news and the right of those who possess information to impart news.[23] He concludes that:

> It is certainly reasonable to conclude that freedom of the press and speech under contemporary conditions includes the right to gather information from government agencies and stands as a constitutional prohibition against all forms of withholding information beyond that reasonably required for the exercise of delegated powers or the protection of other rights.[24]

This, he says, is because a chief purpose of the Bill of Rights was to provide legal protection against methods by which minorities seek to gain or retain power.

The writer then asks if there are constitutional rights residing in the nongovernmental community that are abridged if Congress or the President should exceed their constitutional powers in withholding information. If there are such rights, he asks if they impose further limitations on the powers granted. Since the U.S. Supreme Court has not dealt with this issue directly, however, one cannot define Michigan open meetings law under the U.S. Constitution.

Defining Open Meeting Rights Under the Michigan Constitution

The Michigan constitutions have always mandated that the doors of each house of the legislature be open, but that has been qualified. The 1908 Constitution stated "unless the public welfare demands otherwise." The 1963 Michigan Constitution reads "unless the public security otherwise requires."

To determine what was meant by "public security" it it is necessary to consult the debates of the constitutional convention.

> That, of course, was to take care of the possible but, we hope very remote situation where there would be such a disaster or uprising to affect the public safety and require the legislature to undertake matters with regard to the security of the state.[25]

Similarly, the 1963 Constitution requires that legislative committee business be public:

> . . . On all actions on bills and resolutions in each committee, names and votes of members shall be recorded. Such vote shall be available for public inspection. Notice of all committee hearings and a clear statement of all subjects to be considered at each hearing shall be published in the journal in advance of the hearing.[26]

In addition to opening deliberations of the legislature, the Michigan Constitution establishes open meetings for boards of institutions of higher education: "Formal sessions of governing boards of such institutions shall be open to the public." Speaking at the 1961 Constitutional Convention, Delegate Ink White said:

> Meetings of governing boards of the three major universities have been open to the public and news media only for the past 1/2 dozen years and that has been accomplished only after a long period of negotiations. As it stands, the public and news media are invited guests of the governing board, an invitation which could be, conceivably, withdrawn at any time. It seems to me that now that we are creating by constitutional enactment 7 more such governing boards, it would be appropriate that their formal meetings should be conducted in public sessions.[27]

Unfortunately, the term "formal sessions" has caused argument and misinterpretation. Clarification regarding university and college governing boards has come from opinions of the Michigan attorney general.

In summary, the 1963 Michigan Constitution mandates open meetings of the two houses of the legislature, legislative committees, and governing boards of institutions of higher learning.

Statutory Bases for Open Meetings Legislation

The most comprehensive piece of existing open meetings legislation is the soon-to-be-replaced Michigan Public Meetings Act, 1968 P.A. 261.

The act, only three sections long, requires that public meetings be public and provides for advance notice. Definitions are spelled out in Section 1:

> "Board" means the board of supervisors of any county, the council of any city or village, the board of trustees of any township, the board of education of any school district, the governing body of any

state-supported or partially supported college or university, or the board, commission or other governing body of any state or municipal authority or department created by law which has for its purpose the performance of an essential governmental function.

"Public meeting" means that part of any meeting of a board during which it votes upon any ordinance, resolution, motion or other official action proposed by or to the board dealing with the receipt, borrowing or disbursement of funds or the acquisition, use of (sic) disposal of services or of any supplies, materials, equipment or other property or the fixing of personal or property rights, privileges, immunities, duties or obligations of any person or group of persons. The term "public meeting" shall not mean any meeting, the publication of the facts concerning which would disclose the institution, progress or result of an investigation undertaken by a board in the performance of its official duties.[28]

In other words, if a body that performs an essential governmental function holds a meeting at which a vote is taken, the second section applies: "Every public meeting of a board shall be open to the public."[29] This section has required considerable interpretation by the attorney general. What, for example, is a "public meeting?"

The third section requires posting advance notice at least three days prior to the first regularly scheduled meeting and at least 12 hours prior to a rescheduled meeting or special meeting.

Posting may be effected by (1) posting a copy of the notice prominently at the principal office of the body holding the meeting, (2) posting the notice at the public building in which the meeting is to be held, or (3) publishing the notice in a general-circulation newspaper in the body's political subdivision. The section further requires that the board supply copies of the public notice to newspapers and radio stations within the political subdivision, if they so request.

In addition to P.A. 261, a number of other statutes require various boards to be open. These boards include county civil service commissions, township civil service commissions, city fire and police retirement boards, legislative retirement boards of trustees, township boards, county boards of commissioners, villages, city councils of fourth-class cities, metropolitan transportation authorities and school boards.

Case Law and Implementation of Open Meetings

Three cases are applicable to enforcement of the current Michigan open meetings law.

In *Fucinari v. Dearborn Board of Education*, the Michigan Court of Appeals ruled that a 60-day notice releasing a probationary teacher from employment was defective because the board had acted at an executive session.[30] The action therefore had no legal force or effect. (Under case law in other states, the board would have had only to rerun its action in public session for it to have the full effect of law. It is not known whether this was done here or not.)

In *PIRGIM v. Board of Pharmacy of State of Michigan and Carl E. Cross, Jr., Executive Secretary, Board of Pharmacy*, the Ingham County Circuit Court ordered the board to supply minutes, even though those minutes had not yet been accepted by the board and were not in final form.[31] Of course, the court set precedent only in Ingham County, but Ingham County serves as venue for state agencies. The case has also been used as part of the rationale for an attorney general decision.[32]

The most widely cited case involving open meetings is *Boissonneault v. Mason* or *Boissonneault v. Flint City Council*. This case involved a complaint by Glen A. Boissonneault of the Flint *Journal* against members of the Flint City Council.[33] The plaintiff sought an injunction to restrain the defendants from meeting in private for purposes of discussing or conducting any business of the City of Flint and from precluding any member of the public from attending any such meeting. The circuit court ruled in favor of the plaintiffs. When the defendants appealed, the Court of Appeals affirmed the decision of the lower court. The defendants then appealed to the Michigan Supreme Court and the case was remanded back to trial court. The Michigan Supreme Court opined as follows:

> The agreed statement of facts are:
> "Flint city councilmen have met in City Hall at the request of the city manager on several occasions at which meetings the public was excluded. Subjects of discussion generally effect (sic) overall policy and on occasion may involve items which may require legislative action at a later date."
> If one were to speculate upon what really occurred in these gatherings, any number of possibilities come into focus. For instance:
> 1. A firm decision could have been made with only the formalities of a vote remaining.
> 2. Vague theories could have been tested upon colleagues.
> 3. A preliminary discussion could have taken place regarding a subject which may or may not ever come to a vote.
> 4. Legal advice may have been sought from the city attorney.
> 5. Labor negotiations then taking place may have been the subject.
> 6. A rumor involving the reputation of an employee could have been discussed.
> 7. A possible need for land could have been discussed, the knowledge of which might greatly increase the cost to the taxpayers if the probability blossomed into reality.
> . . . We cannot apply the law to facts which we do not have.[34]

The court retained jurisdiction and, on December 18, 1974, the trial court, acting on behalf of the Michigan Supreme Court, handed down the following order:

> The City Council for the City of Flint, or any members thereof, are restrained from meeting in private for the purpose of making a decision or conducting discussions or deliberations which might lead to a decision involving the city government except for the following purposes:

1. To consider the employment and appointment, dismissal, suspension or disciplining of any one of the four appointed officials who serve at the pleasure of the Council;
2. To consider the appointment or removal of citizens to City Boards and Commissions, provided however, if a decision is reached to remove such an official said official shall have a right upon request to have a public hearing;
3. To discuss strategy sessions and interim reports with respect to collective bargaining or potential or pending litigation;
4. To consider preliminary negotiations involving the purchase or sale of property, both real and personal, but not involving services or the acquisition thereof except as provided hereinabove;
5. To consider records which are specifically exempt by law from public inspection;
6. To consider severe threats of riot or insurrection public knowledge of which, in the opinion of the City Council, would be detrimental to efforts to meet or lessen the threat.[35]

The court stipulated that plaintiffs could commence contempt proceedings for noncompliance and mandated the city attorney to report any violation of the court's injunction. The court then dismissed the plaintiffs' appeal as moot.

The three cases indicate that (1) some actions taken in executive session are null and void, (2) persons living in Ingham County or suing state agencies have a right to minutes even though they have not been officially approved and are not in final form, and (3) the courts have spelled out the limits to which certain boards may hold executive sessions.

Open Meetings and Michigan Attorneys General

In the absence of other law, it is necessary to turn to rulings by state attorneys general regarding open meetings legislation. One must turn to an attorney general decision not only to clarify a particular point of open meetings law, but also to determine the effect of other opinions.

On April 17, 1972, the Michigan Attorney General issued an opinion to the effect that his opinions are binding not only upon state government officials, but upon all government officials within the state.[36] Therefore, unless the courts rule otherwise, his opinions are binding on most officials to whom open meetings legislation might apply.

As was pointed out earlier, the Michigan Constitution of 1963 requires advance notice of all committee *hearings* to be published in the journal of the House of Representatives. On July 8, 1965, however, the attorney general specified that that did not apply to all committee *meetings*.[37]

In 1969, Attorney General Frank J. Kelley clarified "formal sessions" of governing boards of institutions of higher education:

> . . . it is my opinion that whenever the governing board of an educational institution of higher learning is *convened in accordance with established rules* of such body for the transaction of business, it must convene in public session to which the members of the public are to be admitted. Private or executive meetings not held in accordance with established rules or where no business of the board is transacted are not formal sessions. Such private or executive meetings, however, are rarely necessary. And the spirit of our Constitution, the tradition of our democracy, and the need for public access to the workings of public institutions and agencies compel the conclusion they should be actively discouraged. (Emphasis added.)[38]

An institution could conceivably argue, however, that since it is established under the Constitution and not by a lesser agency, the opinion of an attorney general is just that: an "opinion." As previously mentioned, one college board of trustees chairman has questioned the legislature's power to legislate open meetings of such boards of trustees.

A ruling of September 4, 1970, permits members of the press to make tape recordings of public meetings.[39] They must, however, pay for the electricity, and the recording must be made in a way that does not unduly distract from or intrude upon the normal functioning of the meeting.

The landmark attorney general ruling came on January 3, 1972, in a letter to Rep. Kildee. According to Frank J. Kelley:

> (a) persistent problem has been the inclination on the part of the members of some public bodies to go into "executive session" to discuss a matter and then, after private discussion, open the doors of the meeting and take a vote on the decision already made in private. As Attorney General, I have ruled that this conduct is not permissible. . . . I said that such behavior was contrary to the intent of the act (P.A. 261) and that the public has a right to be present during any discussion leading up to the final vote since this portion of the meeting is inherently a part of the requirement that public meetings be open.[40]

Thus, the public not only has a right to attend voting sessions of public bodies, it also has a right to attend sessions leading up to the vote.

On May 22, 1972, the attorney general ruled that in city council rules, any resolution limiting speech of council members during the citizens' portion of a meeting was null and of no effect.[41] The ruling apparently is meant to encourage a dialogue between the public and its elected officials.

On June 7, 1974, the attorney general ruled that county boards of commissioners need not publish verbatim transcripts of their meetings; however, they "must be specific enough to indicate what occurred at the meeting."[42]

On April 26, 1976, Frank J. Kelley reaffirmed an earlier opinion mandating that the public has a right to be present during discussion leading up to the final votes of boards governing institutions of higher education.[43]

The most recent attorney general decision relating to open meetings involved the City of East Detroit and the public's right to listen to the tape recordings of city council meetings that are used to prepare minutes. The attorney general ruling said that the public can listen to the tapes, but it does not carry a mandate for municipalities to pre-

serve them.[44] The decision was based on an Ingham County Circuit Court decision, a Utah decision, and a Michigan statute that says, "that all sessions of the legislative body and all records of the municipality shall be public."[45]

In summation, the Michigan attorneys general have ruled that (1) their opinions are binding on all government officials, (2) only committee hearings and not all meetings are required to be posted in the legislative journal, (3) boards governing institutions of higher education are to be open, (4) the press may tape record public meetings, (5) the public has a right to be present in discussion leading up to the vote, (6) published reports by county boards of commissioners are not required to be verbatim transcripts, and (7) tape recordings of city council proceedings are subject to public disclosure.

Strengthening Michigan's Open Meetings Law

On April 1, 1977, a new, tougher open meetings law will go into effect in Michigan. Although the law culminates years of effort to secure stronger legislation, to many it is less than perfect because it allows a number of exceptions to open meetings.

Early Efforts to Open Meetings

In the 1958 session of the Michigan Legislature, three bills were introduced to provide a general open meetings law, and one passed the Senate with only four dissenting votes. In the House, however, a bitter committee fight ensued and the Michigan Press Association withdrew its support after amendments permitting executive sessions were added to the bill. It then died in committee.

The following year, an open meetings bill was not reintroduced, but one dealing with meetings of boards of education was. It became modified to the extent that the Detroit *Free Press* opposed (7-15-59) committee amendments, saying:

> House Bill 366, in its original form read "The board [meaning boards of education] may hold executive sessions but no final action shall be taken at an executive session."
> Originally the bill stated "All public meetings of the board . . . shall be public and no person shall be excluded therefrom."
> The Senate committee made it read: "The board may hold executive sessions whenever public interest shall require."
> The Senate, if it wishes to respect the only honest interpretation of "public interest" should reject its committee's granting to boards of education a license to operate secretly and pass H.B. 366 in its original form.
> How can the public consider and determine its interest if it is disallowed from knowing what considerations are involved or even what action is being taken on its presumed behalf?

The amendment failed and the bill passed.

By 1976, five open meetings bills were being sponsored in the Michigan Legislature:

Senate Bill 920—introduced June 3, 1965, by Sen. David Plawecki
House Bill 4380—introduced Feb. 25, 1975, by Rep. James Smith
House Bill 5405—introduced June 23, 1975, by Rep. Perry Bullard
House Bill 5684—introduced Oct. 22, 1975, by Rep. David Hollister
House Bill 5931—introduced Jan. 27, 1976, by Rep. Paul Rosenbaum

The house bills of Bullard and Hollister generated interest in the media, but it was Sen. Plawecki's bill, amended by the House, that became law.

House Bill 5405

This bill was the reintroduction of an open meetings bill that Bullard had sponsored the previous session. In the end, he had had to vote against it because exceptions had watered it down. Bullard reintroduced the bill on June 23, 1975, saying Sen. Plawecki's bill was too weak. Overall, the Bullard bill was more detailed than the Hollister bill. Definitions were more complete than the Hollister bill, but advance notice was not spelled out to the same extent. In addition, meetings would have been defined as a full quorum instead of the one-half quorum provision of the Hollister bill. Penalties were detailed to a greater extent than in the Hollister bill, which provided for 90-day imprisonment or a $500 fine. Bullard's bill specified who could commence civil action, declared actions taken in violation as null and void, declared fines for violation of not more than $100 unless the violation were intentional, in which case fines could reach $1,000. The bill also made public officials personally liable in civil actions.

House Bill 5684

This bill was drafted by a 13-member citizens' task force. Following public hearings in December of 1975, it attracted the attention of the media across the state. On January 8, 1976, for example, the *Grand Blanc News* carried an editorial by Elmer White:

> Will the sun shine in Michigan? Will lawmakers adopt so-called "sunshine" legislation, designed to bring the light of open meetings of public bodies to the public?
> . . . One (pending bill) sponsored by Democratic Rep. David C. Hollister of Lansing, defines a meeting as "a gathering of more than one-half quorum of the members of a public body to deliberate or take action upon a matter within the jurisdiction of the public body."
> Sunshine backers have offered this thought: If people are truly interested in having the meetings of their public governing bodies open, their legislators will vote to open them.

On January 30, 1976, Rep. Hollister spoke at a Michigan Press Association conference. He stressed that House Bill 5684 dealt with open meetings, not open government, and said that the bill had five definitions and no exceptions. He justified the lack of exceptions to open meetings on five points:

> 1. Legal advice from an attorney regarding pending litigation.
> In January 1973, I was elected chairman of the Ingham County Board of Commissioners. The

first day after being so elected, I was served in my home with a lawsuit. I was new to the job and frankly scared. I immediately called the County Corporation Counsel. Thereafter, I found that the county usually has $1 to $3 million dollars worth of lawsuits pending on any given day. To allow closed meetings to discuss pending lawsuits would open a loophole large enough to drive a freight train through.

2. Land Purchasing.

. . . I would point out that although the meeting is closed to discuss the transaction, the real estate people know, the bankers know and so do many others. . . . If a compelling public need is demonstrated, the right of eminent domain can be used to acquire the property.

3. Threats to Peace and Public Safety when Emergency Situations Arise.

. . . Emergencies are handled by executive function and are no way hindered by open meeting legislation.

4. Personnel Questions.

One out of every five employees works for the government and is paid for with taxpayer dollars. To allow this exception is to create another large loophole.

Personnel procedures, hiring, firing, disciplining are administrative functions . . . not . . . subject to this act.

However, if the employee opted to go to the governing board for a hearing or ultimate appeal, the case would be heard openly.

5. Labor Strategy Sessions.

This is the toughest issue of all, for even Florida has written in an exception for strategy sessions. I see collective bargaining and especially sophisticated pre-bargaining strategy development being done by administrative staff. This is an executive function and not covered. When presented to the Board, it would be public.[46]

Responding to Hollister's proposed bill, the Port Huron *Times-Herald* wrote (2-4-76):

> . . . It is a strong bill and probably doesn't stand a chance, since the idea of making government totally open makes many legislators uncomfortable. They can always think of reasons why certain discussions, certain decisions should be private.
>
> . . . Life in a fishbowl is probably no great fun for the elected official. But that should be his commitment when he seeks office.

The Lansing *State Journal* wrote (2-8-76):

> For elected officials in Michigan who prefer to conduct public business in the dark shadows of secrecy, State Rep. Dave Hollister, Lansing, has a message: Open the door and let the sun shine in.

In February, Baya Harrison III, former deputy attorney general of Florida who helped to interpret and enforce that state's "sunshine law," arrived in Lansing to stump for the Hollister bill and a proposal for open meetings in the Lansing city government. A Menominee *Herald Leader* editorial observed (2-4-76):

> . . . Obviously a current is running through the state toward a stronger open meetings law. Whether or not the state legislature passes a bill, the time is ripe for the City of Menominee to make its own statement of policy on open government in its new charter.

The Kalamazoo *Gazette* urged (2-12-76) the passage of a strong state open meetings law after Harrison's testimony in a Kalamazoo hearing of the House Towns and Counties Committee:

> . . . As he (Harrison) described the (Florida) law, it requires public bodies to work in public, with labor negotiations being the only exception.
>
> Michigan, in our opinion, would do well to give consideration to something similar. After all, government is the people's business.

In addition to editorial support, the *Gazette* gave the hearing front page coverage, citing objections from school officials who called the plan "entirely impractical" and aimed at "terrorizing" local officials.

House Bill 5684 remained in committee while Plawecki's Senate Bill 920 served as the vehicle of discussion. Although the Hollister bill failed to get out of committee, both it and the Bullard bill served as levers in the passage of the senate bill. If Senate Bill 920 had been rejected, legislators were told, an even tougher bill would take its place.[47]

Passage of Senate Bill 920

In June of 1975, Sen. David Plawecki introduced his open meetings bill to the Senate Affairs Committee of the Michigan Legislature. When it got back on the Senate floor, it was promptly gutted by a series of crippling amendments.

First, Sen. Charles O. Zollar (R-Benton Harbor) inserted language requiring only "formal" decisions and deliberations to be open to the public. The *State Journal* quoted (12-3-75) Sen. Plawecki's response as:

> Essentially, it has eliminated public access to the process of decision-making, which is the major abuse my bill hopes to end. Through this amendment, public bodies can discuss and vote on a bill in secrecy, and merely confirm the private vote at the "formal meeting." If the word "formal" is broadly construed by the courts, the open meetings law could provide less protection than the current law for the public's right to know.

A January 25, 1976, Detroit *Free Press* editorial took Sen. Daniel S. Cooper (D-Oak Park) to task for other amendments:

> One of Sen. Cooper's amendments, for example would allow public bodies to exclude the public from an "informational session." Any meeting to discuss any kind of public business can be called an "informational session"—the result will be government by secrecy.
>
> Only a handful of senators had the courage to stand up to Sen. Cooper and the Senate majority.

In the same way that the term "formal" was a stumbling block to opening meetings of boards governing institu-

tions of higher education, interpretation of "informational sessions" was a problem.

About the same time, in his state of the state message, Gov. William Milliken called for a strong open meetings law.

> A year ago I suggested that Michigan's open meeting law was too vague and called for it to be strengthened. . . . I will oppose any attempts to weaken the existing law. At the same time, I feel that further clarifications designed to prevent any doubts about the meaning of the current provisions should be considered by the Legislature.[48]

On January 14, House Speaker Bobby D. Crim emphasized that the House must enact

> a strong open meetings bill which will enable the people of this state to exercise the full political responsibilities of citizenship. The public's business will truly belong to the public only insofar as all citizens have clear and certain access to the rooms and chambers in which it is conducted, and this Legislature ought to act now to open them at every level of government in this state.[49]

The governor supported (*State Journal*, 2-4-76) the Plawecki bill and criticized the weakening amendments: "The law very definitely needs further clarification and strengthening—but it certainly does not need to be weakened." Milliken spelled out what he wanted in an open meetings bill—only limited executive session exceptions, mandatory public notice for all meetings, the publication of a phone number to call for information, and stiff enforcement provisions including the voiding of actions taken at illegal secret meetings. He said (*State Journal*, 2-4-76) these were the minimum standards a new law should meet:

> Any attempt at revision of the existing law that does not meet these basic objectives will represent an unacceptable retreat from the real progress that has been made in ensuring that government is open and responsive to the people it serves.

On March 3, Senate Bill 920 passed the Senate and was sent to the House Towns and Counties Committee. Commenting on the bill's inadequacy, the Lansing *State Journal* wrote (3-6-76):

> For those concerned about the need for government to conduct the public's business in public, there might be an initial impulse to applaud an open meetings bill just passed by the State Senate. Even a quick look, however, shows there is not much to cheer about. The Senate measure appears to be little more than window dressing—and, in fact, could make for more secrecy in government rather than less.
>
> Basically, the bill starts out by saying that the business of public bodies be conducted in the open. Cheers. Then it goes on to list all kinds of exemptions.
>
> The House should not accept this bill and indeed should come back with something much stronger and more specific.

Between March 4 and June 8, when House Substitute for Senate Bill No. 920 left committee with a 9-1-1 bipartisan vote and a recommendation for passage by the full House, some 45 amendments had been offered in response to questions posed by groups such as the Michigan Municipal League, the Michigan Hospital Association, the Liquor Control Commission, school board, township and county associations. (Commenting on the Michigan Hospital Association's opposition, a committee aide said, "They would rather have a doctor go on killing people than discuss discipline in public, because malpractice insurance might go up.")[50]

Reactions to the bill were mixed. Tim Richard, editorial director of the *Observer* and *Eccentric* newspapers, told the committee to "(k)eep up the good work," adding

> I'm not enough of a legal expert to detect any fishhooks, but in general I think this is a vast improvement over previous legislation the two houses were considering.
>
> I am particularly pleased that the problem of special meetings is being treated in the context of an open meetings bill, because this is where a great many abuses were coming from.
>
> I am happy to see that the hypocritical term "executive" has been replaced by the more honest term "closed."[51]

Stanley A. Thompson, Superintendent of Inland Lakes Schools, found the bill "demanding yet reasonable." However, he went on to say, "I cannot understand why legislation already in existence in the state is insufficient to provide proper surveilance (sic) of meetings of various public bodies."[52]

Zolton Ferency, associate professor of criminal justice at Michigan State University, also a former Democratic state party chairman and standard bearer for the Human Rights Party, questioned the need for such a law because of existing constitutional guarantees:

> Such legislation tends to water down constitutional guarantees, and should only be considered after a court of appropriate jurisdiction has ruled against the assertions of such rights under constitutional provisions. In my opinion, such a test has not yet been made of the people's right of open access to all proceedings of public bodies.[53]

Thus, he agreed with constitutional lawyer Wallace Parks that the implied constitutionality of the public to attend proceedings of its public bodies has not been tested thoroughly in the courts.

Differing with Ferency was Fred L. Mathews, chairman of the board of trustees of Southwestern Michigan College, who supported his opinion with an unnamed legal opinion by Professor Charles Rice of the Notre Dame Law School.

> Several weeks ago I sent you a copy of my testimony before the *House Town* (sic) *and Counties Committee* in which I opposed the *Open Meeting Bill* on practical, ethical and constitutional grounds. I again assure you that if this unconstitutional legislation is passed, it will also be tested in the courts. I am confident it too will be declared unconstitutional. (Emphasis supplied.)[54]

Elmer White said, "I believe most newspaper people in Michigan would support SB 920 in its present form," but cautioned against any more exceptions to open meetings.[55]

Richard A. Ross, state personnel director, took issue with the five-day preparation time for minutes and offered several other amendments dealing with hiring in executive session, leaving personnel matters to closed session unless openness is requested, allowing closed sessions for determining pay and benefits and/or potential or pending litigation, and requiring persons seeking civil relief to post security.[56]

Charlotte Copp, president of the League of Women Voters of Michigan, urged the committee to adopt the bill while Malcom Katz, deputy superintendent of the Michigan department of educaton, and Carl Levin, president of the Detroit city council, urged still more weakening amendments and exemptions from open meeting requirements.

Associated Press writer Mary Stevenson summed up (*State Journal*, 6-9-76) the difference between Senate Bill No. 920 when it left the Senate on May 3 and House Substitute for Senate Bill No. 920 as it left the House Towns and Counties Committee on June 8.

> The bill as it came from the Senate allowed closed sessions for a variety of reasons including informational sessions, discussions on hiring or meetings with attorneys.
>
> The bill as it now stands requires that before a closed meeting is called for the reasons allowed, a roll call vote must be taken and the minutes must contain an explanation of why the closed session is needed. A closed-door session requires approval by a two-thirds majority.
>
> Under the bill, a public official who intentionally violates the act is guilty of a misdemeanor punishable by a fine of up to $1,000 for the first offense. If he is convicted a second time in the same term, he must be removed from office.

The measure passed the House of Representatives on June 24, 97 to 6. Reps. Hollister and Brown had done their homework providing ready answers to a number of potentially crippling amendments. In all, the House Substitute bill withstood four and one half hours of debate and escaped more than three dozen floor amendments. Following passage of the bill, Rep. Brown wrote a press release that said:

> All of the valid questions and objections to openness have been dealt with in this act. So in this, our 200th year as a nation, the nation of Democracy, it could not be a better time to assure the people of Michigan that what rightfully belongs to them shall truly be theirs: THE ABILITY TO OPENLY VIEW THEIR AGENTS OF GOVERNMENT—our elected and appointed public officials——TO VIEW THEM AS THEY PERFORM THEIR DUTIES WHICH WE HAVE DELEGATED TO THEM—TO VIEW THEM AS THEY SPEND *OUR TAX DOLLARS*—AND TO VIEW THEM WHEN THEY MAKE THE NECESSARY AND CRUCIAL DECISIONS THAT AFFECT OUR LIVES![57]

House Substitute for Senate Bill No. 920 then went to conference committee.

Conferees for the House were Reps. Brown and Hollister. Conferees for the Senate were Sens. William Faust (D-Westland), Robert VanderLaan (R-Grand Rapids), and David Plawecki. Sen. Cooper fought to get on the conference committee but was unsuccessful. Following that, a committee aide said there were some 13 changes from the way the bill had passed the House and of those, probably eight or nine were at the insistence of Cooper.[58]

Among the changes, subcommittees were exempted from advance notice provisions. Partisan caucuses of members of the state legislature were permitted to meet in closed session over objections from Hollister and Fredricks. When he later cast a dissenting vote Fredricks said:

> Mr. Speaker and members of the House:
> I voted against the conference report on Senate Bill 920 because this is another instance of separate standards for the legislature compared with local government.
> The conference report provided that legislators caucuses will be exempt from the provisions of the bill. How different is a caucus decision on policy from a meeting of part of the school board at someone's home or the closed gathering of part of the township board? It is easy for the legislature to impose strict open meeting requirements when it is basically exempt from them itself.[59]

Hollister's section requiring automatic removal from office was considered unconstitutional because it conflicted with Article IV, section 16 of the Michigan Constitution. In its place, second offenses were made a high misdemeanor with a possible year imprisonment and a $2,000 fine. The conference committee required some 150 meetings and on July 2, the bill went to the floor of the Senate.

The July 2 session was the last before the legislature adjourned for the summer. Sen. VanderLaan was not anxious to report the bill out of committee because of the bulk of legislation requiring action. The bill went to the floor but was repeatedly held up by Sen. Cooper.

In a thinly veiled reference to Cooper, Rep. Brown directed a press release that stated: ". . . even while the Conference report was being printed and then, while the report was being debated in the Senate, one senator continued to demand changes in the bill's language."[60] Every time Cooper demanded changes, of course, the report had to be sent back for reprinting. Because of this, a number of senators, including Earl Nelson (D-Lansing), were absent from the final vote. The report lost with 19 yeas and 8 nays because it lacked a majority of senators. Sen. Plawecki, however, moved to reconsider the vote by which the conference report was not adopted and the motion to reconsider prevailed.

During the summer, extensive lobbying took place to secure passage of House Substitute for Senate Bill 920 in its amended form at the first conference. In addition to representatives and aides supporting the report and gathering support from fellow Democrats, Bill Long of the governor's staff lobbied with Republicans.

In a press release directed by Sen. Plawecki's office, Dan Troutman wrote:

> One of the first tasks before the Senate when the Legislature reconvenes on September 13 will be

reconsideration of the Open Meetings Act, which addresses one of the most critical—and controversial—issues in government.[61]

The press release further mentioned the Plawecki motion to reconsider which had kept the bill from dying and, fortunately, a second conference was not necessary.

On September 16, 1976, the bill passed both the House and Senate. Senate Bill No. 920 was signed into law on October 5, 1976, by Governor Milliken, who said:

> Citizens need to know—in fact they must know—what their government is doing. This new law helps open government to the bright light of public scrutiny and responds to the public's right to know.[62]

Reactions from the News Media

Reaction to the new open meetings bill has generally been supportive, if not overwhelmingly laudatory. Immediately following passage by the Senate and House, Detroit *Free Press* reporter Louis M. Heldman wrote (9-17-76):

> Both houses of the Legislature passed Thursday the most comprehensive bill in Michigan history requiring open meetings of public bodies.
> . . . Ironically, after passing the open meetings measure, the Senate adjourned into closed party caucuses, which are permitted under the bill.

The Lansing *State Journal* said (9-20-76):

> The bill passed last week was a compromise. It is one of several "open meetings" bills argued in the legislative halls in recent years. The bill has some weaknesses, but overall it is an encouraging step away from the closed door practices.
> . . . Though the proposal may have weaknesses cited by critics, it puts in writing rules designed to help the public know what's going on in government. That is an improvement compared to what we have now.

Following the signing of the bill, the *State Journal* wrote (10-7-76):

> One of the best things to come out of the Michigan legislature this year was passage in September of an open meeting bill for public agencies after years of struggle and delay.
> Gov. Milliken signed the measure into law Tuesday despite critics who contend it is both too lenient and too restrictive.
> We think the law is a reasonable compromise between such extremes. The alternative for the legislature was to do nothing—which is what it has done for years. Because of that the state has lived too long with largely meaningless and unenforceable open meeting laws.

A Detroit *Free Press* editorial said (9-19-76):

> The Open Meetings bill passed by the Legislature represents a significant step toward better government in Michigan.
> Better because the public can be more assured that it will know what government is doing.
> . . . The new law does not go as far as we would have liked. . . . We are sorry to see the House and Senate insisting that the secrecy of their own partisan legislative caucuses be sanctioned by state law. Even Congress is starting to open up its party caucuses to public view; state legislative leaders should open up the Lansing meetings, especially since such a blast of fresh air would not be prohibited by the new law.

The Oakland *Press* editorialized (9-21-76) that:

> In Oakland County, many government boards and commissions have traditionally found it advantageous to keep the public at arm's length, each nurturing its own style of excluding the public from debates over policies.
> The county commissioners meet in closed-door party caucuses. Road commissioners huddle in the managing director's office before public sessions. The parks commission frequently schedules meetings without notifying the press or public. And many school boards routinely meet privately before public sessions convene.
> If those bad habits persist next year, some of those public officials could find themselves in court—or jail.

III. EPILOGUE

Enrolled Senate Bill No. 920 was codified as Public Act 267 of 1976. At this writing, the new law has been in effect for less than two weeks.

As could be expected, the act generated much confusion on the part of local officials. To further complicate matters, a major court ruling, *Boissonneault v. Mason*, which closely paralleled numerous provisions of the new act, was dismissed by the Michigan Supreme Court.

Opinion No. 5183

In a 35-page opinion, the Michigan attorney general mentioned confusion on the part of public officials:

> Basically the Act provides that all meetings of a public body shall be open to the public and shall be held in a place that is available to the general public. Section 3(1). There are, however, numerous complexities in the Act requiring explanation and clarification; this may be attested to by the fact that, since its enactment, I have received 32 requests from public officials seeking my interpretation of its various provisions.[63]

An interview with Mark Bloomer, the staff attorney who authored Opinion No. 5183, revealed that the loss of the *Boissonneault* decision drastically altered the yardsticks by which effectiveness of such an act can be measured legally.[64]

Ramifications of the Boissonneault v. Mason Dismissal

Bloomer said the *Boissonneault* case had been appealed to the Michigan Supreme Court sometime in late December 1976 and was dismissed on technicalities no one fully understands.

"It's not clear why it was dismissed," he said, adding that attorneys in his office had tried to follow the case and found only a dismissal that was very obfuscatory. As

a result, he said, *"Boissonneault* is a weak case and fishy." Ramifications of its dismissal are three-fold.

First, its loss removes virtually the only comprehensive test for many of the act's specific provisions.

Second, its absence means that other case law must necessarily be used for determining the act's effectiveness for various public bodies. Two cases serve this end; however, they are not open meetings decisions.

In *People v. Seeley*, the Michigan Court of Appeals ruled that where an irreconcilable conflict exists between the provisions of two statutes covering an identical subject, the statute which deals specifically with the public body will govern over the statute which deals with the topic generally.[65]

When applied to P.A. 267, then, the open meetings law becomes the statute that deals with the topic generally, and mandates for openness in the various statutes that establish the various public bodies deal with the topic specifically. This cannot be lightly construed, however.

In *Czyszkowski v. Lansing*, the same appellate court ruled that it should be determined first that the two sections present an *uncompromising conflict* on the same topic, before *People v. Seeley* applies.[66]

Then, the third ramification. Because of the test cases above, the Michigan attorney general sent Rep. Thomas Brown, chairman of the House Towns and Counties Committee, a letter advising him that the legislature should consider amending a list of 100 statutes. In addition to these, Bloomer said, the Legislative Services Bureau sent Rep. Brown another list of 95 statutes which may need amendment if the intent of P.A. 267 is to be truly effected. Bloomer commented:

> These statutes are either vaguely or specifically in conflict with P.A. 267. They should be amended unless you want a board to claim that their statute allows them to operate with less openness. Many present gray shadows and a particular way of reading could cause conflict.[67]

One of these 195 statutes is mentioned specifically in Opinion No. 5183:

> Lynn Marcy, Chairman, Board of Forensic Polygraph Examiners:
> "There appears to be a conflict between the provisions of the statute controlling hearings of the Board of Forensic Polygraph Examiners and the Open Meetings Act. In such a case which statute prevails and controls the requirements of such a meeting?"[68]

Rationale follows for the answer:

> 1972 PA 295, sec. 20; MCLA 338.1720; MSA 18. 186(2), provides that hearings to consider the revocation of a polygraph examiner license shall be closed unless the respondent personally, or through counsel, submits a written request for a public hearing. The Act in section 3(1) provides:
> "All meetings of a public body shall be open to the public and shall be held in a place available to the general public. All persons shall be permitted to attend any meeting except as otherwise provided in this act."
>
> License revocation hearings of the Board of Forensic Polygraph Examiners is an example of a specific statutory exception to the general requirement of the Act that all meetings be publically [sic] held. Pursuant to the rule that, in case of a conflict, the specific governs over the general, it is my opinion that license revocation hearings conducted by the Board of Polygraph Examiners are to be closed unless otherwise required as provided by 1972 PA 295 sec. 20, *supra*. This exception to the Board of Forensic Polygraph Examiners to the Act, however, does not apply to other meetings of the Board of Forensic Polygraph Examiners when it performs a duty other than holding a license revocation hearing.[69]

Other Problems Following Implementation of P.A. 267

There have been some cases in which public bodies have delegated their authority to administrative staff rather than discuss certain things in the open. A good example would be a school board that refuses to consider a personnel matter and turns it over to the principal or superintendent.

"If a board is allowed to delegate its authority," Bloomer said, "there's nothing you can do about it."[70]

Another problem he cited stems from resolutions based on legal interpretations that are probably illegal. The intent of the law is clear. It was passed to increase, not decrease, openness.

At the local level, however, some public officials refuse to accept its basic tenets. An example from northern Oakland County illustrates the point.

The new law provides: "Sec. 3(5). A person shall be permitted to address a meeting of a public body under rules established and recorded by the public body." Bloomer said the Oakland County school board interpreted this as authorizing them to pass a resolution that stated "no non-resident of the school district may address a meeting." The resolution was then used to prevent a schoolteacher, who lived outside the district's boundaries, from addressing his board. Bloomer said:

> Such a resolution is probably illegal. The law says "a person," not "persons with legitimate interest." When an interpretation is carried to such an extreme that a schoolteacher can't even address his own board, it's ridiculous.[71]

Conclusions

Public Act 267 is basically a law that can accomplish what legislators intended it to by bringing about greater openness on the part of boards that deliberate in the public's behalf.

The reasons public officials may close a meeting are quite exclusive under the act. The only possible exception or "accordion clause" is probably section 8(h), which states: "A public body may meet in closed session . . . to consider material exempt from discussion or disclosure by state or federal statute."

In the matter of material exempted by state statute, a sister bill to the Open Meetings Act should prevent wholesale abuse of this clause. Public Act 442 was sponsored by Rep. Perry Bullard and signed by Governor Milliken in January. This "freedom of information act," together with P.A. 267, will form the nucleus of a Michigan reporter's rights.

In the face of ever-changing case law, however, it is evident that Michigan's new open meetings law is not ironclad. Before the dismissal of *Boissonneault v. Mason* by the Michigan Supreme Court, the exclusivity of the act's exceptions had withstood the acid test of the courts even before the act went into effect. But the fact that the case was dismissed, if only for a technicality that has nothing to do with open meetings, means that the degree of openness now required of 195 public bodies is in doubt.

FOOTNOTES

1. Woodrow Wilson, *The New Freedom* (New York: Doubleday, Page & Co., 1913), p. 131.
2. See Kent Cooper, *The Right to Know* (New York: Farorr, Strauss & Cudahy, 1958).
3. James Madison, "Letter to W. T. Barry, Aug. 4, 1822," *The Complete Madison*, ed. Saul Padover (New York: Harper & Brothers, 1953), p. 337.
4. Harold L. Cross, *The People's Right to Know: Legal Access to Public Records and Proceedings* (Morningside Heights, New York: Columbia University Press, 1953), p. xiii.
5. Thomas Jefferson, "Letter to Coray, 1823," *Democracy*, ed. Saul K. Padover (New York: Appleton-Century-Crofts, Inc., 1939), p. 164.
6. Cross, p. 14.
7. California Government Code (1953), Sec. 54950.
8. James R. Wiggins, *Freedom or Secrecy* (New York: Oxford University Press, 1956), p. 3.
9. Thomas Jefferson, "Letter to Judge Tyler, 1804," *Democracy*, p. 163.
10. Judith M. Baldwin, "Access Laws: Development," *Freedom of Information Center Publication No. 86* (Columbia, Missouri: University of Missouri, 1962), p. 2.
11. Baya Harrison III, testimony before Lansing City Council, Jan. 10, 1976.
12. *Bassat v. Braddock*, 262 So.2d (Fla.) 425 (1972).
13. Wallace Parks, "The Open Government Principle: Applying the Right to Know Under the Constitution," *The George Washington Law Review*, Oct., 1957, p. 11.
14. Baldwin, p. 2.
15. W. M. Tugman, "The People's Right to Know," *State Government*, 1954, pp. 225-26.
16. Albert G. Pickerell and Edward L. Feder, *Open Public Meetings of Legislative Bodies: California's Brown Act* (Berkely, California: University of California, 1957), p. 37.
17. Letter from Fred L. Mathews, chairman, board of trustees, Southwestern Michigan College, to Rep. Thomas H. Brown, chairman, Michigan House Towns and Counties Committee, May 7, 1976.
18. *Ibid.*
19. Rep. David C. Hollister, press conference, Sept. 16, 1976.
20. Letter opinion from Michigan Attorney General Frank J. Kelley to Sen. Daniel S. Cooper, April 26, 1976.
21. Baldwin, p. 3.
22. Cross, p. 182.
23. Parks, p. 10.
24. *Ibid.*, p. 12.
25. Michigan *Official Record, Constitutional Convention* 1961, Vol. II, p. 2280.
26. Michigan *Constitution* (1963), Art. 4, Sec. 17.
27. Michigan *Official Record*, Vol. I, p. 1187.
28. Michigan *Compiled Laws* (1970), Sec. 15.251.
29. *Ibid.*, Sec. 15.252.
30. *Fucinari v. Dearborn Board of Education*, 32 Mich. App. 108, 188 N.W.2d 229 (1971).
31. *PIRGIM v. Board of Pharmacy of State of Michigan*, Circuit Court, Ingham County, Docket No. 75-17842-CZ.
32. Letter opinion of Michigan Attorney General Frank J. Kelley to Sen. Joseph M. Snyder, Nov. 4, 1976.
33. *Boissonneault v. Mason*, 392 Mich. 685, 225 N.W.2d 519 (1974).
34. *Ibid.*
35. *Ibid.*
36. Letter opinion of Michigan Attorney General Frank J. Kelley to Sen. William Faust, April 17, 1972.
37. 1965 Michigan OAG 4427 (July 8, 1965).
38. 1969 Michigan OAG 4676 (Aug. 13, 1969).
39. Letter opinion of Michigan Attorney General Frank J. Kelley to Rep. William Ballenger, Sept. 14, 1970.
40. 1972 Michigan OAG 1372 (Jan. 3, 1972).
41. Letter opinion of Michigan Attorney General Frank J. Kelley, May 22, 1972.
42. 1974 Michigan OAG 4820 (June 7, 1974).
43. 1969 Michigan OAG 4676 (Aug. 13, 1969).
44. Letter opinion of Michigan Attorney General Frank J. Kelley to Sen. Joseph M. Snyder, Nov. 4, 1976.
45. *PIRGIM v. Board of Pharmacy of State of Michigan; Conver, et al v. Board of Education of Nebo School District, et al*, 1 Utah 375, 267 P2d 768 (1954); Michigan *Public Act* 279 (1909), Sec. 3(L).
46. David C. Hollister, "A New Day of Sunshine in Michigan", (speech at Michigan Press Association Conference, East Lansing, Jan. 30, 1976).
47. Interview with Neil Krentzin, Michigan House Towns and Counties Committee aide, Sept. 28, 1976.
48. Gov. William G. Milliken, "State of the State Message" (speech before joint session of Michigan Legislature, Jan., 1976).
49. Rep. Bobby D. Crim, speech before Michigan House, Jan. 14, 1976.
50. Krentzin interview.
51. Letter from Tim Richard, editorial director, *The Observer* and *Eccentric* newspapers, to Rep. Thomas H. Brown, April 30, 1976.
52. Letter from Stanley A. Thompson, superintendent of Inland Lakes Schools, to Rep. Thomas H. Brown, May 3, 1976.
53. Letter from Zolton Ferency, associate professor of criminal justice, Michigan State University, to Rep. Thomas H. Brown, May 4, 1976.
54. Letter from Mathews to Brown.
55. Letter from Elmer E. White, executive secretary, Michigan Press Association, to Rep. Thomas H. Brown, May 5, 1976.
56. Letter from Richard A. Ross, Michigan personnel director, to Rep. Thomas H. Brown, May 10, 1976.
57. Rep. Thomas H. Brown, press release, June 25, 1976.
58. Krentzin interview.
59. Michigan, *Journal of the House of Representatives*, 78th Legislature, Regular Session, 1976, p. 2730.
60. Rep. Thomas H. Brown, press release, July 9, 1976.
61. Sen. David Plawecki, press release, Sept. 6, 1976.
62. Executive Office, Michigan Capitol, press release, Oct. 5 1976.
63. 1977 Michigan OAG 5183 (March 8, 1977), p. 1.
64. Interview with Mark Bloomer, office of the Michigan attorney general, April 6, 1977.
65. *People v. Seeley*, 24 Mich. App. 539, 545-546; 180 N.W.2d 333, 336 (1970).
66. *Czyszkowski v. Lansing*, 64 Mich. App. 94, 97; 235 N.W.2d 72, 73 (1975).
67. Bloomer interview.
68. 1977 Michigan OAG 5183 (March 8, 1977), p. 17.
69. *Ibid.*, p. 17-18.
70. Bloomer interview.
71. *Ibid.*